

Legislative Council Brief

File Ref.: SBCR 3/5691/95 Pt.22

Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (IRELAND) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (NETHERLANDS) ORDER

INTRODUCTION

At the meeting of the Executive Council on 10 December 2002, the Council ADVISED and the Acting Chief Executive ORDERED that –

- _____ (a) the Mutual Legal Assistance in Criminal Matters (Ireland) Order at **Annex A**; and
- _____ (b) the Mutual Legal Assistance in Criminal Matters (Netherlands) Order at **Annex B**;

should be made under Section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance, subject to the approval of the Legislative Council, to implement the bilateral arrangements for mutual legal assistance ("MLA") in criminal matters with the abovementioned countries.

JUSTIFICATIONS

2. The Hong Kong Special Administrative Region ("HKSAR") is fully committed to international cooperation in combating serious crimes. In this connection, we have embarked on a program to establish a network of bilateral agreements with other jurisdictions on mutual legal assistance in criminal matters. These agreements ensure

reciprocity between the contracting parties and enhance international cooperation in the fight against transnational crime.

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the necessary statutory framework for implementing the mutual legal assistance arrangements and enables provision of assistance in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of the proceeds of crime.

THE ORDERS

4. The Mutual Legal Assistance in Criminal Matters Agreements with Ireland and the Netherlands were signed on 19 September 2001 and 26 August 2002 respectively. The two Orders to be made under Section 4(1) of the Ordinance will enable the Agreements to be brought into force and enable the Ordinance, subject to the modifications summarized in the schedule to the relevant Order, to be applicable as between HKSAR and these countries. **Schedule 1** to each of the Orders contains a copy of the relevant bilateral agreement.

5. Section 4(2) of the Ordinance provides that the Chief Executive in Council shall not make an order unless the arrangements for MLA to which the order relates are substantially in conformity with the provisions of the Ordinance. The two Agreements do so conform. They are similar to the model agreement for HKSAR which had been agreed by the former Sino-British Joint Liaison Group and approved by the former Executive Council before reunification as the basis for the conduct of negotiations.

6. Section 4(3) of the Ordinance provides that where an order specifies modifications to the Ordinance, those modifications shall be summarized in a schedule to the order. The modifications, which are set out in **Schedule 2** to each of the Orders, reflect the areas in which the relevant agreement varies from the Ordinance.

7. An explanatory statement in relation to the modifications to the Ordinance is at **Annex C**.

8. The commencement date of the two Orders will be appointed by the Secretary for Security by notice in the Gazette. These dates will coincide with the dates on which the relevant agreements enter into force. The commencement date will be settled after

consultation with the countries concerned and will depend upon when the necessary domestic procedures of those countries have been completed.

LEGISLATIVE TIMETABLE

9. The legislative timetable will be -

Introduction into the Legislative Council	12 February 2003
Commencement	to be specified by the Secretary for Security

IMPLICATIONS OF THE ORDERS

10. The Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of the Ordinance. They have no sustainability or financial and staffing implications.

PUBLIC CONSULTATION

11. The Orders will permit the Agreements to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

PUBLICITY

12. A Legislative Council brief and a press release will be issued. A spokesman will be available to answer enquiries.

BACKGROUND

13. Section 4(1) of the Ordinance provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that the Ordinance shall, subject to such modifications as may be specified

in the order, apply as between HKSAR and the place outside HKSAR to which the arrangements relate.

14. Eleven Orders in relation to MLA bilateral arrangements (with Australia, the USA, France, the UK, New Zealand, Italy, South Korea, Switzerland, Canada, Philippines, and Portugal) have been made under Section 4(1) of the Ordinance.

ENQUIRES

15. Enquires on the content of this paper should be directed to:-

Mrs. Margaret Chan Principal Assistant Secretary for Security	<u>Telephone No.</u> 2810 2329
Ms. Angelina Kwan Assistant Secretary for Security	2810 3523

**Security Bureau
December 2002**

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(IRELAND) ORDER**

(Made by the Chief Executive in Council under section 4 of
the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Ordinance to apply between Hong Kong
and Ireland**

In relation to the arrangements for mutual legal assistance –

- (a) which are applicable to the Government and the Government of Ireland; and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and Ireland.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN

THE GOVERNMENT OF THE HONG KONG SPECIAL

ADMINISTRATIVE REGION OF THE PEOPLE'S

REPUBLIC OF CHINA

AND

THE GOVERNMENT OF IRELAND
CONCERNING
MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS

TABLE OF CONTENTS

Article 1	Scope of Assistance
Article 2	Central Authority
Article 3	Other Agreements or Arrangements
Article 4	Form and Contents of Requests
Article 5	Execution of Requests
Article 6	Limitations on Assistance
Article 7	Representation and Expenses
Article 8	Limitations on Use
Article 9	Obtaining of Evidence, Articles or Documents
Article 10	Obtaining Statements of Persons
Article 11	Location or Identity of Persons
Article 12	Service of Documents
Article 13	Publicly Available and Official Documents
Article 14	Certification and Authentication
Article 15	Transfer of Persons in Custody
Article 16	Transfer of Other Persons
Article 17	Safe Conduct
Article 18	Search and Seizure
Article 19	Assistance in Proceedings relating to Proceeds of Crime
Article 20	Settlement of Disputes
Article 21	Entry into Force and Termination

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China and the Government of Ireland,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the tracing, restraint and confiscation of criminal proceeds and instrumentalities of crime,

Have agreed as follows :

ARTICLE 1

SCOPE OF ASSISTANCE

- (1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.
- (2) Assistance shall include:
 - (a) identifying and locating persons;
 - (b) serving of documents;
 - (c) the obtaining of evidence, including testimony or statements of persons;
 - (d) executing requests for search and seizure;
 - (e) facilitating the personal appearance of persons to give evidence or provide other assistance;
 - (f) effecting the temporary transfer of persons in custody to give evidence or provide other assistance;
 - (g) identifying, tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of crime;
 - (h) providing information, articles, documents and records, including judicial or official records;
 - (i) delivery of property, including lending of exhibits;
 - (j) such other assistance as may be agreed between the Parties and which is consistent with the objectives of this Agreement.
- (3) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE 2

CENTRAL AUTHORITY

- (1) Each Party shall designate a Central Authority to make and receive requests pursuant to this Agreement.
- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for Ireland shall be the Minister for Justice, Equality and Law Reform or a person designated by the Minister. Either Party may change its Central Authority in which case it shall notify the other of the change.
- (3) The Central Authorities may communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

OTHER AGREEMENTS OR ARRANGEMENTS

This Agreement shall be without prejudice to other rights and obligations between the Parties pursuant to other agreements and shall not prevent the Parties or their law enforcement authorities from providing assistance to each other pursuant to other agreements or formal or informal arrangements.

ARTICLE 4

FORM AND CONTENTS OF REQUESTS

- (1) A request for assistance shall be in writing except that the Central Authority of the Requested Party may accept a request in another form in emergency situations. In the latter case, the request shall be confirmed in writing within ten days thereafter unless the Central Authority of the Requested Party agrees otherwise. The request shall be in an official language of the Requested Party unless otherwise agreed.
- (2) Requests for assistance shall include the following:
 - (a) the name of the authority on behalf of which the request is made;

- (b) a description of the purpose of the request and the nature of the assistance requested;
 - (c) a description of the subject matter and nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
 - (d) where proceedings have been instituted, details of the proceedings;
 - (e) a summary of the relevant facts and laws; and
 - (f) the identity of any person or persons being investigated or prosecuted.
- (3) To the extent necessary and possible, a request shall also include:
- (a) information on the identity and location of any person from whom evidence is sought;
 - (b) information on the identity and location of any person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
 - (c) information on the identity and possible whereabouts of any person to be located;
 - (d) a precise description of any place or person to be searched and of any articles to be seized;
 - (e) a description of the manner in which any evidence or statement is to be taken and recorded;
 - (f) a list of questions to be asked of any person;
 - (g) a description of any particular procedure to be followed in executing the request;
 - (h) information as to the allowances and expenses to which any person asked to appear in the Requesting Party will be entitled;
 - (i) any requirements for confidentiality;

- (j) details of the period within which the request should be complied with;
 - (k) any court order, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
 - (l) any other information which may facilitate the execution of the request.
- (4) All documents submitted in support of a request shall if required by the Requested Party be accompanied by a translation in an official language of the Requested Party.

ARTICLE 5

EXECUTION OF REQUESTS

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed subject to the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with any directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

ARTICLE 6

LIMITATIONS ON ASSISTANCE

- (1) The Requested Party shall refuse assistance if:

- (a) the request for assistance impairs the sovereignty, security or public order of Ireland or, in the case of the Government of the Hong Kong Special Administrative Region, of the People's Republic of China;
- (b) the request for assistance relates to an offence that is regarded by the Requested Party as an offence of a political character;
- (c) the request relates to an offence under military law that would not be an offence under ordinary criminal law;
- (d) it considers that there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his or her race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
- (f) it is of the opinion that the granting of the request would seriously impair its essential interests;
- (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
- (h) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence;
- (i) the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out;
- (j) in relation to the investigation of taxation offences, the primary purpose of the investigation is the assessment or collection of tax.

(2) For the purpose of paragraph (1)(f) the Requested Party may take into account whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

- (3) For the purpose of paragraph (1)(h):
- (a) the totality of the acts or omissions alleged to constitute the offence against the law of the Requesting Party shall be considered and not merely the legal elements of that offence;
 - (b) for offences relating to taxes, duties, or customs controls, it shall be immaterial that the law of the Requested Party does not impose the same kind of tax, duty or customs control or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.
- (4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing criminal investigation, prosecution or proceeding under the law of that Party.
- (5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority –
- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
 - (b) shall consult with the Requesting Party to determine whether the assistance sought should only be granted in part or subject to such terms and conditions as the Requested Party deems necessary.
- (6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

ARTICLE 7

REPRESENTATION AND EXPENSES

- (1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
- (2) The Requested Party shall assume all ordinary expenses of executing a request within its jurisdiction except:
- (a) fees of counsel retained at the request of the Requesting Party;

- (b) fees of experts;
- (c) expenses of translation and interpretation;
- (d) travel expenses and allowances of persons travelling between the Parties; and
- (e) other expenses to the extent that these are of an extraordinary nature.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 8

LIMITATIONS ON USE

(1) The Requested Party shall, to any extent requested, keep confidential a request for assistance, its contents and any supporting documents, and the fact of granting such assistance except to the extent that disclosure is necessary to execute the request. If the request cannot be executed without breaching such confidentiality as may be requested, the Requested Party shall so inform the Requesting Party which shall then determine the extent to which it wishes the request to be executed.

(2) The Requesting Party shall, to any extent requested, keep confidential any evidence and information provided by the Requested Party, except to the extent that disclosure is necessary for the investigation, prosecution or proceeding described in the request.

(3) The Requesting Party shall not use for purposes other than those stated in a request evidence or information obtained as a result of it, without prior consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary.

ARTICLE 9

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (4) Where evidence is to be taken pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting Party may, subject to the law of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.
- (5) If a person who is required to give evidence pursuant to a request for assistance asserts a claim of immunity, incapacity, or privilege under the law of the Requested Party, it shall be resolved pursuant to the Requested Party's law. If such a claim is asserted under the law of the Requesting Party, the evidence shall nonetheless be taken and the claim made known to the Central Authority of the Requesting Party for subsequent resolution by the authorities of that Party.
- (6) Upon request, the Central Authority of the Requested Party shall furnish information in advance about the date and place of the taking of evidence pursuant to this Article.

ARTICLE 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in

the jurisdiction of the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

LOCATION OR IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

ARTICLE 12

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.
- (5) A person who fails to comply with any process served on him or her shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents.
- (2) The Requested Party may at its discretion provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 14

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE 15

TRANSFER OF PERSONS IN CUSTODY

- (1) A person in the custody of one Party whose presence in the other Party is sought for purposes of assistance under this Agreement shall be transferred for those purposes if the person and both Parties consent.
- (2) For the purpose of this Article:
 - (a) the receiving Party shall have the obligation to keep the person transferred in custody unless otherwise authorised by the sending Party;

- (b) the receiving Party shall return the person transferred to the custody of the sending Party as soon as circumstances permit, unless otherwise agreed by both Parties and the person transferred;
- (c) the receiving Party shall not require the sending Party to initiate extradition proceedings for the return of the person transferred; and
- (d) the person transferred shall receive credit for service of the sentence imposed in the sending Party for time served in the custody of the receiving Party.

(3) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the receiving Party the sending Party shall so advise the receiving Party which shall ensure the person's release from custody, and where appropriate facilitate the person's return to the sending Party.

ARTICLE 16

TRANSFER OF OTHER PERSONS

- (1) The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the Requesting Party for the purpose of providing assistance pursuant to this Agreement.
- (2) Upon receipt of such a request, the Requested Party shall invite the person to travel to the Requesting Party to provide assistance and shall inform the Requesting Party of the person's response.

ARTICLE 17

SAFE CONDUCT

- (1) A person who consents to provide assistance pursuant to Articles 15 or 16 of this Agreement shall, while he or she is in the jurisdiction of the Requesting Party giving assistance under this Agreement, not be prosecuted, detained, or restricted in his or her personal liberty for any criminal offence, or subject to suit in any civil matter, which preceded his or her departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 15, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his or her presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 15 or 16 shall not be subject to prosecution based on his or her testimony, except for perjury or contempt.

(4) A person who consents to provide assistance pursuant to Articles 15 or 16 shall not be required to give assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Articles 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 18

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions as to return and safe custody imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party, including any terms and conditions to protect third party interests in the property.

ARTICLE 19

ASSISTANCE IN PROCEEDINGS RELATING TO PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of crime are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds or instrumentalities may be located in its jurisdiction.
- (2) Where pursuant to paragraph (1) suspected proceeds or instrumentalities of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those proceeds or instrumentalities pending a final determination in respect of them by a court of the Requesting Party.
- (3) Where a request is made for assistance in securing the confiscation of proceeds or instrumentalities of crime such request shall be executed subject to the law of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities of crime to which the request relates.
- (4) The Party that has custody over proceeds or instrumentalities of crime shall dispose of them in accordance with its law. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the transferring Party's law and upon such terms as the Parties may agree.

ARTICLE 20

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

ARTICLE 21

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.

(2) Either Party may terminate this Agreement at any time by giving notice to the other Party. In that event the Agreement shall cease to have effect three months following the date of notification. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if it was still in force.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done in duplicate at the Hong Kong Special Administrative Region this nineteenth day of September Two thousand and one in the Chinese, Irish and English languages, each text being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows –

“(e) the request relates to the prosecution of a person –*

(i)* for an external offence in a case where the person –*

(A) * has been convicted, acquitted or pardoned by a competent court or other authority in the place, ** or Hong Kong*,* or

(B) * has undergone the punishment provided by the law of that place or Hong Kong*,

in respect of that offence or of another external offence constituted by the same act or omission as that offence;

- (ii) in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time; *

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows –

“(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for –

- (i) the purpose to which the request relates; or
(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person gives assistance.”.

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

Clerk to the Executive Council

COUNCIL CHAMBER

2002

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and Ireland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of Ireland and signed in Hong Kong on 19 September 2001. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(NETHERLANDS) ORDER**

(Made by the Chief Executive in Council under section 4
of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Ordinance to apply between Hong Kong and Netherlands

In relation to the arrangements for mutual legal assistance –

- (a) which are applicable to the Government and the Government of the Kingdom of the Netherlands; and
- (b) a copy of which is annexed at Schedule 1,

it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Kingdom of the Netherlands.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN

THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE'S
REPUBLIC OF CHINA

AND

THE GOVERNMENT OF THE KINGDOM OF THE
NETHERLANDS

CONCERNING

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region"), having been duly authorised by the Central People's Government of the People's Republic of China, and the Government of the Kingdom of the Netherlands, hereinafter referred to as the Parties;

Desiring to improve the effectiveness of their co-operation in criminal matters and in the confiscation of proceeds of crime;

Have agreed as follows :

ARTICLE 1

SCOPE OF ASSISTANCE

- (1) The Parties shall provide each other, in accordance with the provisions of this Agreement, the widest measure of mutual assistance in investigations, prosecutions or proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the Requesting Party.
- (2) Assistance shall include, in particular :
 - (a) identifying and locating persons;
 - (b) taking testimony or other statements in the Requested Party;
 - (c) providing information, objects, documents, records and evidence, including exhibits;

- (d) facilitating the personal appearance of persons in the Requesting Party to give testimony or to provide other assistance;
- (e) executing requests for search and seizure;
- (f) identifying, tracing, restraining and confiscating proceeds of crime as defined in Article 16; and
- (g) serving of documents.

(3) Assistance under this Agreement shall include assistance in connection with offences against a law relating to taxation, customs duties or other revenue matters, but not in connection with non criminal investigations or proceedings relating thereto.

ARTICLE 2

CENTRAL AUTHORITY

(1) The Central Authorities of the Parties shall process all requests for assistance made in accordance with the provisions of this Agreement and handle all other communications concerning the application, interpretation and implementation of the Agreement.

(2) For the purposes of this Agreement, “Central Authority” means :

- (a) for the Hong Kong Special Administrative Region: the Secretary for Justice;
- (b) for the Kingdom of the Netherlands: the Minister of Justice of the Netherlands, the Minister of Justice of the Netherlands Antilles, or the Minister of Justice of Aruba, as the case may be.

ARTICLE 3

OTHER ASSISTANCE

This Agreement shall not preclude assistance being provided pursuant to other agreements or arrangements that are applicable to the Parties.

ARTICLE 4

GROUND OF REFUSAL

The Requested Party shall refuse assistance if :

- (a) the request relates to acts or omissions which would not have constituted an offence under the law of the Requested Party, if they had taken place within its jurisdiction;
- (b) the Requested Party being the Government of the Kingdom of the Netherlands, the execution of the request would impair the sovereignty, security, public order, or essential interests of the Kingdom of the Netherlands;
- (c) the Requested Party being the Government of the Hong Kong Special Administrative Region, the execution of the request would impair :
 - (i) the sovereignty, security or public order of the People's Republic of China; or
 - (ii) the essential interests of the Hong Kong Special Administrative Region;
- (d) the request relates to an offence of a political character;
- (e) the request relates to an offence under military law which is not an offence under ordinary criminal law;
- (f) the Requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting a person on account of his race, religion, nationality or political opinions;
- (g) the request relates to the prosecution of a person who is or who has become, for any reasons provided under the law of the Requested Party, immune from prosecution for the offence that underlies the request;
- (h) the Requesting Party cannot comply with conditions in relation to confidentiality or limitation as to the use of information or evidence to be provided.

ARTICLE 5

REQUESTS

- (1) Requests shall be made in writing or, where appropriate, through electronic means that are capable of leaving a written record.
- (2) Requests for assistance shall include :
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the nature of the investigation, prosecution or proceeding and of the acts or omissions which constitute the offence underlying the request, as well as a summary of the relevant laws or the text of the applicable provisions, including the maximum penalty prescribed for the offence;
 - (c) the purpose of the request, the nature of the assistance being sought and its relevance to the investigation, prosecution or proceeding;
 - (d) where appropriate, a description of the formalities or procedures to be followed by the Requested Party in executing the request and the reasons therefor;
 - (e) any requirements for confidentiality and the reasons therefor; and
 - (f) a specification of any time limit within which compliance with the request is required and the reasons therefor.
- (3) The Requesting Party may provide any other information it deems helpful for the execution of the request, including a description of the evidence or the information sought.
- (4) The Requesting Party may require that the Requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the Requested Party cannot comply with the required confidentiality, it shall promptly consult with the Requesting Party.
- (5) The Requested Party may request additional information considered necessary to execute the request.

(6) A request and documents submitted in support of the request shall, if they are not in English, be accompanied by translation into English.

ARTICLE 6

EXECUTION OF REQUESTS

(1) A request shall be promptly executed and in accordance with time limits set out in the request. However, if there are circumstances which prevent compliance within the time limits or which are likely to cause a significant delay in executing the request, the Requested Party shall promptly inform the Requesting Party.

(2) A request shall be executed in accordance with the provisions of this Agreement, the law of the Requested Party and, provided that they are not contrary to that Party's law, with any formalities and procedures expressly set out in the request.

(3) If the Requesting Party expressly requests, the Central Authority of the Requested Party shall inform it of the date and place of the execution of the request.

(4) Without prejudice to Article 10, paragraph (3), the Requested Party shall give favourable consideration to a request by the Requesting Party that the authorities involved and interested persons, and their legal representatives be present at the execution of a request.

(5) The Requested Party may postpone assistance if the execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(6) Before refusing or postponing assistance, the Requested Party shall promptly inform the Requesting Party of the reasons for considering refusal or postponement and consult with that Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(7) The Requested Party shall inform the Requesting Party in writing of a decision to refuse assistance and the reasons therefor.

ARTICLE 7

REPRESENTATION AND EXPENSES

- (1) The Requested Party shall represent the interests of the Requesting Party in any proceedings arising out of a request for assistance.
- (2) The Requested Party shall meet the costs of executing the request except that the Requesting Party shall bear :
 - (a) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person whilst in the Requesting Party pursuant to a request; and
 - (b) the expenses associated with conveying custodial or escorting officers.
- (3) If before or during the execution of the request it becomes apparent that execution of the request would impose an excessive burden on the Requested Party's resources or involve expenses of an extraordinary nature, the Parties shall consult to determine the terms and conditions under which the execution of the request may proceed or continue.

ARTICLE 8

LIMITATIONS ON USE

- (1) The Requested Party may require that the Requesting Party not use any information or evidence obtained under this Agreement in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested Party. In such a situation, the Requesting Party shall comply with the requirement.
- (2) The Requested Party may require that information or evidence furnished under this Agreement be kept confidential or be used only subject to terms and conditions it may specify. If the Central Authority of the Requesting Party accepts the information or evidence subject to such conditions, the Requesting Party shall comply with the conditions.

ARTICLE 9

TAKING OF EVIDENCE

Where a request is made that evidence be taken, the Requested Party shall arrange to have such evidence taken. The taking of evidence shall include the production of objects, documents, records and exhibits.

ARTICLE 10

TAKING OF TESTIMONY IN THE REQUESTED PARTY

- (1) Where a request is made that testimony be taken in the Requested Party, that Party shall arrange to have such testimony taken.
- (2) In addition to the information referred to in Article 5, paragraph (2), the Requesting Party shall specify in its request the questions to be put to the person who is required to give testimony or the subject matter about which he or she is to be examined.
- (3) The authorities involved in the Requesting Party and interested persons, and their legal representatives, may, subject to the law of the Requested Party, be present and question the person giving the testimony.
- (4) A person who is required to give testimony may decline to do so where either :
 - (a) the law of the Requested Party would permit him or her to decline to give testimony in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) the law of the Requesting Party would permit him or her to decline to give testimony in such proceedings in the Requesting Party.
- (5) If a person claims that there is a right to decline to give testimony under the law of the Requesting Party, the Central Authority of the Requested Party shall, where appropriate, consult with the Central Authority of the Requesting Party and rely on a declaration provided by that Authority.

ARTICLE 11

VIDEO CONFERENCE

Where possible and consistent with their laws, the Parties may agree on a case by case basis that the taking of testimony takes place by means of video conference under specified conditions.

ARTICLE 12

TAKING OF TESTIMONY AND PROVIDING ASSISTANCE IN THE REQUESTING PARTY

(1) If the Requesting Party considers the appearance of a person in the Requesting Party necessary for the purpose of giving testimony or providing other assistance, it may ask the Requested Party to invite that person to appear.

(2) In addition to the information referred to in Article 5, paragraph (2), a request pursuant to this Article shall contain information as to :

- (a) the reason why the person's appearance in the Requesting Party is considered necessary;
- (b) the approximate dates on which the person is required to appear;
- (c) the person's rights, protections and obligations under the law of the Requesting Party;
- (d) where appropriate, arrangements for the person's security;
- (e) arrangements for the person's travel to and stay in the Requesting Party as well as his return; and
- (f) the amount of allowances payable to the person, including travel and accommodation expenses.

(3) The Requested Party shall, if satisfied that appropriate arrangements for that person's safety will be made by the Requesting Party, invite the person to appear in the Requesting Party and seek that person's concurrence thereto.

(4) A person who declines to appear shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 13

TRANSFER OF PERSONS IN CUSTODY TO THE REQUESTING PARTY

(1) A person in custody in the Requested Party whose appearance is requested in the Requesting Party for the purpose of giving testimony or providing other assistance shall, if the Requested Party consents, be transferred to the Requesting Party for that purpose, provided that the Requesting Party has guaranteed maintaining the person in custody and his or her subsequent return as soon as the person's presence is no longer required, but no later than the time specified by the Requested Party.

(2) Transfer may be refused if :

- (a) the person concerned does not consent to appear;
- (b) his or her presence is required for an investigation or proceeding pending in the Requested Party; or
- (c) there are other overriding grounds against transfer.

(3) Where a person in custody who is transferred, becomes entitled under the law of the Requested Party to be released from custody whilst he or she is in the Requesting Party, the Requested Party shall inform the Requesting Party which shall ensure the person's release and thereafter treat the person as a person referred to in Article 12.

(4) A person who does not consent to be transferred shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 14

SAFE CONDUCT

(1) A person who consents to appear in the Requesting Party pursuant to Articles 12 or 13 shall not be prosecuted, detained, or restricted in his or her personal liberty in the Requesting Party for any criminal offence or be subject to any civil suit or any proceeding to which the person could not be subjected if he or she were not in the Requesting Party, in respect of any act or omission which preceded the person's departure from the Requested Party.

(2) Paragraph (1) shall cease to apply if the person, being free to leave, has not left the Requesting Party within a period of 15 days after having been officially notified that his or her presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give testimony in the Requesting Party pursuant to Articles 12 or 13 shall not be subject to prosecution based on the testimony given, except in relation to perjury.

(4) A person who consents to give testimony in the Requesting Party pursuant to Articles 12 or 13 may decline to give testimony where either :

- (a) the law of the Requested Party would permit him or her to decline to give testimony in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit him or her to decline to give testimony.

(5) If a person claims that there is a right to decline to give testimony under the law of the Requested Party, the Central Authority of the Requesting Party shall, where appropriate, consult with the Central Authority of the Requested Party and rely on a declaration provided by that Authority.

(6) A person who consents to appear in the Requesting Party pursuant to Articles 12 or 13 shall not be required to give testimony or to provide assistance in any proceedings other than those mentioned in the request.

ARTICLE 15

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure or the production of documents, records or articles and transfer any material thus obtained, or copies thereof, to the Requesting Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of a search, the place and circumstances of seizure and the subsequent custody of the material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

ARTICLE 16

CONFISCATION

- (1) For the purpose of this Agreement, “proceeds of crime” shall mean :
 - (a) assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets derived from or obtained, directly or indirectly, through the commission of an offence or the value which corresponds to such assets; and
 - (b) property, equipment or other instrumentalities used in or destined for use in the commission of an offence.
- (2) The Requested Party shall, upon request, endeavour to :
 - (a) identify and trace any proceeds of crime located within its jurisdiction; and
 - (b) restrain with a view to preventing any dealing in, transfer or disposal of such proceeds of crime.
- (3) The Requested Party shall execute requests referred to in paragraph (2) in accordance with its law, pending a final determination in respect of those proceeds by a court of the Requesting Party. The Requested Party shall notify the Requesting Party immediately of the result of the execution of the request.
- (4) The Requested Party shall, upon request, confiscate proceeds of crime in accordance with its law.
- (5) In addition to the information referred to in Article 5, paragraph (2), requests made under this Article shall :
 - (a) indicate, as precisely as possible, the description and the location of the proceeds of crime and their connection with the person suspected of, charged with or convicted of the offence; and

- (b) where the request is made under paragraph (4), be accompanied by a copy of any order of confiscation made by a judicial authority of the Requesting Party and a declaration by the Central Authority of the Requesting Party that the order is final and enforceable.
- (6) Proceeds of crime confiscated pursuant to this Article shall be retained by the Requested Party. However, a Party may, to the extent permitted by its law, offer to transfer the proceeds of crime, or part thereof, to the other Party upon such terms as may be agreed.
- (7) In the application of this Article, the rights of bona fide third parties shall be respected.

ARTICLE 17

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document relating to a criminal matter transmitted to it for the purpose of service, provided that the document is accompanied by a translation into an official language of the Requested Party or at the minimum, a translation of the essential passages thereof.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response within a reasonable time before the scheduled response.
- (3) The Requesting Party shall transmit a request for the service of a document pertaining to an appearance in the Requesting Party at least thirty days before the scheduled appearance.
- (4) The Requested Party shall give proof of service :
- (a) by means of a receipt dated and signed by the person served; or
 - (b) by means of a declaration made by the Requested Party consistent with its domestic law that service has been effected and stating the form and date of such service.
- (5) A person who fails to comply with a document served on him or her pursuant to this Article shall not by reason thereof be liable to any penalty or coercive measure pursuant to the law of either Party.

ARTICLE 18

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

- (1) Subject to its law the Requested Party shall, upon request, provide copies of publicly available documents.
- (2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 19

CERTIFICATION

Evidence, documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified if the Requesting Party so requests. For that purpose certification by the Central Authority of the Requested Party shall be sufficient.

ARTICLE 20

PROVISION OF INFORMATION IN CONNECTION WITH PROCEEDINGS

Where an offence has been committed in one of the Parties and that offence may also be prosecuted by the other Party, the Party where the offence was committed may, if it decides not to prosecute the offence, inform the other Party. Upon request, the Party where the offence was committed, may assist the other Party, in particular by providing information and evidence in relation to that offence, with a view to prosecution of the offence in the latter Party.

ARTICLE 21

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities themselves are unable to reach agreement.

ARTICLE 22

TERRITORIAL APPLICATION

As regards the Kingdom of the Netherlands this Agreement shall apply to the part of the Kingdom in Europe only and may be extended to the Netherlands Antilles and/or to Aruba at the request of the Kingdom of the Netherlands.

ARTICLE 23

ENTRY INTO FORCE

- (1) This Agreement shall enter into force on the first day of the second month following the date on which the Parties have notified each other in writing that their respective legal requirements have been complied with.
- (2) This Agreement shall apply to any requests presented after its entry into force even if the relevant acts and omissions occurred before that date.

ARTICLE 24

TERMINATION

Either Party may terminate this Agreement at any time by written notification. Termination shall become effective six months after the date of the receipt of such notification. In case of extension of the applicability of this Agreement to the Netherlands Antilles and/or Aruba, the Kingdom of the Netherlands shall be entitled to terminate the application of this Agreement in respect of any of the constituent parts of the Kingdom of the Netherlands.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region this twenty-sixth

day of August Two Thousand and Two in duplicate in the Chinese, English and Dutch languages, each version being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows –

“(e) the request relates to the prosecution of a person for an external offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in the place or Hong Kong*, or has undergone the punishment provided by the law of that place or Hong Kong*, in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.

2. Section 17(3)(b) of the Ordinance shall be modified to read as follows –

“(b) the person has had an opportunity of leaving Hong Kong, 15 days have expired since that opportunity* and the person* has remained in Hong Kong otherwise than for –

- (i) the purpose to which the request relates; or
- (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The words underlined are added. (The underlining is for ease of identifying the modification).

Clerk to the Executive Council

COUNCIL CHAMBER

2002

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Kingdom of the Netherlands. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of Hong Kong and the Government of the Kingdom of the Netherlands and signed in Hong Kong on 26 August 2002. A copy of those arrangements is annexed at Schedule 1 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 2 to the Order.

Explanatory Statement on the Modifications to the Ordinance

***Mutual Legal Assistance in Criminal Matters
(Ireland) Order ("Ireland Order")***

Previous Convictions etc.

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 6(1)(e) of the Hong Kong/Ireland Agreement provides for refusal when immunity from prosecution has been acquired both in relation to convictions etc. in the requested jurisdiction and also where prosecution would not have been possible because of lapse of time had the offence occurred in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the agreement by extending the protection to cover the situation in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 17(2) of the Hong Kong/Ireland Agreement provides that the immunities will continue to be applicable for a period of 15 days after the person has had the opportunity of leaving Hong Kong. The modification reflects the additional protection in the agreement by providing for 15 day period in section 17.

Explanatory Statement on the Modifications to the Ordinance

Mutual Legal Assistance in Criminal Matters (*Netherlands*) Order ("*Netherlands Order*")

Immunity from Prosecution

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 4(g) of the Hong Kong/Netherlands Agreement provides for refusal when immunity from prosecution has been acquired in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the agreement by extending the protection in the Ordinance to cover immunity from prosecution acquired in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives a person who comes to Hong Kong from another jurisdiction to render assistance certain immunities. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 14(2) of the Hong Kong/Netherlands Agreement provides that the immunities will continue to be applicable for a period of 15 days after the person has had the opportunity of leaving Hong Kong. The modification reflects the additional protection in the agreement by providing for a 15 day period in section 17.